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draft offset plan or disapproval of a draft offset plan. Public hearings will not be held on issues under paragraphs (h)(3) (i) and (ii) of this section.

(3) During a public hearing under this section, any person may submit oral or written comments concerning the draft offset plan or disapproval of a draft offset plan. The Administrator may set reasonable limits on the time allowed for oral statements and will require the submission of written summaries of each oral statement.

(4) The Administrator will assure that a record is made of the hearing.

(j) *Response to Comments.* (1) The Administrator will consider comments on the draft offset plan or disapproval of a draft offset plan received during the public comment period and any public hearing. The Administrator is not required to consider comments otherwise received.

(2) In approving or disapproving an offset plan, the Administrator will:

(i) Identify any draft offset plan provision or portion of the statement of basis that has been changed and the reasons for the change; and

(ii) Briefly describe and respond to relevant comments under paragraph (j)(1) of this section.

(k) *Approval and Effective Date of Excess Emissions Offset Plans.* (1) After the close of the public comment period, the Administrator will approve an offset plan requiring allowance deductions in an amount equal to the unit's tons of excess emissions or disapprove an offset plan. The Administrator will serve a copy of any approved offset plan and the response to comments on the designated representative for the affected unit involved and serve written notice of the approval or disapproval of the offset plan on any persons who are entitled to written notice under paragraphs (g)(2)(i) (B) and (C) of this section or who submitted written or oral comments on the approval or disapproval of the draft offset plan. The Administrator will also give notice in the FEDERAL REGISTER.

(2) The Administrator will approve an offset plan requiring immediate deduction from the unit's compliance subaccount of all allowances necessary to offset the excess emissions except to the extent the designated representa-

tive of the unit demonstrates that such a deduction will interfere with electric reliability.

(3) Upon approval of the offset plan by the Administrator, the offset plan will be incorporated into the Acid Rain permit in accordance with § 72.84 (automatic permit amendment) and shall supersede any inconsistent provision of the permit.

[58 FR 3757, Jan. 11, 1993, as amended at 62 FR 55487, Oct. 24, 1997; 62 FR 66279, Dec. 18, 1997]

§ 77.5 Deduction of allowances to offset excess emissions of sulfur dioxide.

(a) The Administrator will deduct allowances to offset excess emissions in accordance with the offset plan approved under § 77.4(b) (1) or (k) or in accordance with § 72.91(b) of this chapter.

(b) The designated representative shall hold enough allowances in the appropriate compliance subaccount to cover the deductions to be made in accordance with paragraph (a) or paragraph (c) of this section.

(c) If the designated representative does not submit a timely and complete proposed offset plan, or if the Administrator disapproves a proposed offset plan under § 77.4 (c) or (k), the Administrator will immediately deduct allowances, from the unit's compliance subaccount on a first-in, first-out basis in accordance with § 73.35(c)(2) of this chapter, equal to the amount of the unit's excess emissions of sulfur dioxide.

(d) If a compliance subaccount does not contain adequate allowances to offset the excess emissions, the Administrator will deduct the required allowances whenever allowances are recorded to that account.

§ 77.6 Penalties for excess emissions of sulfur dioxide and nitrogen oxides.

(a)(1) If excess emissions of sulfur dioxide or nitrogen oxide occur at an affected unit during any year, the owners and operators of the affected unit shall pay, without demand, an excess emissions penalty, as calculated under paragraph (b) of this section.

(2) If one or more affected units governed by an approved NO_x averaging plan under § 76.11 of this chapter fail

(after applying § 76.11(d)(1)(ii)(C) of this chapter) to meet their respective alternative contemporaneous emission limitations or annual heat input limits, then excess emissions of nitrogen oxides occur during the year at each such unit. The sum of the excess emissions of nitrogen oxides of such units shall equal the amount determined under § 76.13(b) of this chapter. The owners and operators of such units shall pay an excess emissions penalty, as calculated under paragraph (b) of this section using the sum of the excess emissions of nitrogen oxides of such units.

(3) Except as otherwise provided in this paragraph (a)(3), payment under paragraphs (a) (1) or (2) of this section shall be submitted to the Administrator by 30 days after the date on which the Administrator serves the designated representative a notice that the process of recordation set forth in § 73.34(a) of this chapter is completed or by July 1 of the year after the year in which the excess emissions occurred, whichever date is earlier. Payment under paragraph (a)(1) of this section for any increase in excess emissions of sulfur dioxide determined after adjustments made under § 72.91(b) of this chapter shall be submitted to the Administrator by 30 days after the date on which the Administrator serves the designated representative a notice that process set forth in § 72.91(b) of this chapter is completed.

(b) *Penalty formula.* (1) The following formulas shall be used to determine the excess emissions penalty:

Penalty for excess emissions of sulfur dioxide = \$2000/ton × annual adjustment factor × tons of excess emissions of sulfur dioxide.

Penalty for excess emissions of nitrogen oxides = \$2000/ton × annual adjustment factor × tons of excess emissions of nitrogen oxides.

(i) The annual adjustment factor will be calculated as follows:

$$\text{Annual adjustment factor} = 1 + \frac{\{\text{CPI}(\text{year}) - \text{CPI}(1990)\}}{\text{CPI}(1990)}$$

where:

(A) "CPI(year)" is the Consumer Price Index as defined in § 72.2 of this chapter and "year" is the year in which the unit had excess emissions.

(B) "CPI(1990)" is the Consumer Price Index for 1990, as defined in § 72.2 of this chapter.

(ii) The Administrator will publish the annual adjustment factor in the FEDERAL REGISTER by October 15 of each year beginning in 1995.

(2) The penalty may be rounded to the nearest dollar after completing the calculation in paragraph (b)(1)(i) of this section.

(3) The penalty for excess emissions of sulfur dioxide shall be paid separately from the payment for excess emissions of nitrogen oxides. Each payment shall be accompanied by a document, in a format prescribed by the Administrator, indicating the unit for which the payment is made, whether the payment is for excess emissions of sulfur dioxide or nitrogen oxides, the number of tons of excess emissions, the penalty amount, and the check or money order number of the payment.

(c) If an excess emissions penalty due under this part is not paid on or before the applicable deadline under paragraph (a) of this section, the penalty shall be subject to interest charges in accordance with the Debt Collection Act (31 U.S.C. 3717). Interest shall begin to accrue on the date on which the Administrator mails, to the designated representative of the unit with excess emissions, a demand notice for the payment.

(d)(1) Except for wire transfers made in accordance with paragraph (d)(2) of this section, payments of penalties shall be made by money order, cashier's check, certified check, or U.S. Treasury check made payable to the "U.S. EPA."

(2) Payments made under paragraph (c)(1) of this section shall be mailed to the following address, unless the Administrator has notified the designated representative of a different address: U.S. EPA: Headquarters Accounting Operations Branch, Acid Rain Excess Emissions Penalties, P.O. Box 952491, St. Louis, MO 63195-2491.

(3) Payments of penalties of \$25,000 or more may be made by wire transfer to the U.S. Treasury at the Federal Reserve Bank of New York.

(e) If the Administrator determines that overpayment has been made, he or

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she will refund the overpayment without interest, as promptly as administratively possible.

(f) Excess emissions in any year resulting directly from an order issued in that year under section 110(f) of the Act shall not be subject to the penalty payment requirements of this section; *provided* that the designated representative of any unit subject to such order shall advise the Administrator within 30 days of issuance of the order that the order will result in such excess emissions.

[58 FR 3757, Jan. 11, 1993, as amended at 60 FR 17131, Apr. 4, 1995; 62 FR 55487, Oct. 24, 1997]

PART 78—APPEAL PROCEDURES FOR ACID RAIN PROGRAM

Sec.

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AUTHORITY: 42 U.S.C. 7601 and 7651, et. seq.

SOURCE: 58 FR 3760, Jan. 11, 1993, unless otherwise noted.

§ 78.1 Purpose and scope.

(a)(1) This part shall govern appeals of any final decision of the Administrator under parts 72, 73, 74, 75, 76, and 77 of this chapter; *provided* that matters listed § 78.3(d) and preliminary,

procedural, or intermediate decisions, such as draft Acid Rain permits, may not be appealed.

(2) Filing an appeal, and exhausting administrative remedies, under this part shall be a prerequisite to seeking judicial review. For purposes of judicial review, final agency action occurs only when a decision appealable under this part is issued and the procedures under this part for appealing the decision are exhausted.

(b) The decisions of the Administrator that may be appealed include but are not limited to:

- (1) Under part 72 of this chapter;
 - (i) The determination of incompleteness of an Acid Rain permit application;
 - (ii) The issuance or denial of an Acid Rain permit and approval or disapproval of a compliance option by the Administrator;
 - (iii) The approval or disapproval of an early ranking application for Phase I extension under § 72.42 of this chapter;
 - (iv) The final determination of whether a technology is a qualified repowering technology under § 72.44 of this chapter;
 - (v) The issuance or denial of an exemption under § 72.14 of this chapter;
 - (vi) The approval or disapproval of a permit revision;
 - (vii) The decision on the deduction or return of allowances under §§ 72.41, 72.42, 72.43, 72.44, 72.91(b), and 72.92 (a) and (c) of this chapter; and
 - (viii) The failure to issue an Acid Rain permit in accordance with the deadline under § 72.74(b) of this chapter.
- (2) Under part 73 of this chapter,
 - (i) The decision on a claim of error in a transfer recordation;
 - (ii) The decision on the allocation of allowances from the Conservation and Renewal Energy Reserve;
 - (iii) The decision on the allocation of allowances under regulations implementing sections 404(e), 405(g)(4), 405(i)(2), and 410(h) of the Act;
 - (iv) The decision on the allocation of allowances under part 73, subpart F of this chapter;
 - (v) The decision on the sale or return of allowances and transfer of proceeds under part 73, subpart E; and